Supreme Court, U.S.
FILED
APR 9 1997
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IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF MARYLAND	*	
Petitioner	*	
v.	*	**No. 96-1248**
LABARON STANBERRY	*	
Respondent	*	

* * * * * * * * * * * * * * *

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, Labaron Stanberry, who has been found to meet the qualifications for representation by the Office of the Public Defender of the State of Maryland, asks leave to proceed *in forma pauperis* pursuant to Rule 39. Counsel for Respondent is unable to attach an affidavit in support of this motion, signed by Respondent and notarized by a notary public, for the following reasons. As soon as counsel for Respondent received William Suter's letter requesting a brief in opposition to the State of Maryland's Petition for Writ of Certiorari in this case, counsel for Respondent sent the affidavit in support of the motion to proceed *in forma pauperis* to Respondent at his current address in New Jersey. Respondent had been given permission by the Maryland trial court to have his probation transferred to New Jersey and said probation was in fact transferred on June 27, 1996. Respondent has not yet responded to the letters sent to him by counsel regarding the affidavit in support of the motion to proceed *in forma*

pauperis and has not yet returned the affidavit. The State of Maryland Interstate Compact Unit, which indirectly supervises out-of-state probationers, is attempting to locate Respondent and assist counsel for Respondent in obtaining the necessary affidavit. As soon as such affidavit can be obtained, counsel for Respondent will forward it to this Court.

Respectfully submitted,

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Assistant Public Defender
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Baltimore, MD 21202
(410) 767-8544

Counsel for respondent

96-1248

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

STATE OF MARYLAND,

Petitioner

v.

LABARON STANBERRY,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEPHEN E. HARRIS
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Counsel for respondent

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* * * * * * * * * * * * * * *

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of April, 1996, three copies of respondent's Brief in Opposition and Motion for Leave to Proceed in Forma Pauperis were hand delivered to Gary E. Bair, Esquire, Assistant Attorney General, Office of the Attorney General, Criminal Appeals Division, 200 Saint Paul Street, Baltimore, Maryland 21202, (410) 576-6422, counsel for petitioner.

Melissa M. Moore
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Counsel for respondent

QUESTIONS PRESENTED

Whether the Court of Appeals of Maryland correctly held that the lower court erred in denying Respondent's motion to suppress the contents of his suitcase which was left on a Greyhound bus during a twenty minute stop at the Maryland House and which was searched in Respondent's absence after police officers held it up and asked the passengers on the bus whether it belonged to them and received no response?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, LaBaron Stanberry, by counsel, Stephen E. Harris, Public Defender of Maryland, and Melissa M. Moore, Assistant Public Defender, Office of the Public Defender for the State of Maryland, respectfully request that the Court deny the petition for writ of certiorari filed by the State of Maryland as there has been no showing that the question presented is one that merits consideration by this Court.

STATEMENT OF THE CASE

Trooper Edward Burnette testified that on August 16, 1993, he was working with Corporal Kevin Welkner and Trooper Michael Milburn monitoring Greyhound buses at the Maryland House on Interstate I-95 as part of a routine drug interdiction program. (M. 5-7).[1] At 8:55 p.m., the bus on which Respondent was traveling arrived at the rest stop and the passengers disembarked for a twenty minute break. (M. 7-10). The officers did not count the passengers as they exited the bus nor did they see the bus driver count the passengers. (M. 31). Trooper Burnette spoke to the bus driver and received permission to board the bus. M. 10). At 9:20 p.m., the passengers began reboarding the bus, after which the bus driver "took a count" and was satisfied that everybody was back on the bus. (M. 11). At that time, the bus was two hundred yards away from the Maryland House and not visible to anyone inside the Maryland House. (M. 12, 38).

Trooper Burnette then boarded the bus, announced to the passengers that they were having a problem with drugs being transported on commercial buses through the state, and asked for their cooperation in showing their bags, "just pointing them out as we asked what bags they had on the bus or what luggage." (M. 11). Once the announcement was made, Troopers Burnette and Milburn began asking the passengers to show them their luggage. (M. 12). When Trooper Burnette came to the sixth seat on the left-hand side, he observed a black suit bag in an overhead

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[1] Transcript references are to the motion to suppress hearing in the Circuit Court for Harford County held on March 24, 1994.

compartment and asked if the bag belonged to anyone in the area. (M. 12). No one claimed the bag. (M. 12). Trooper Burnette did not recall whether there was a vacant seat near the unclaimed bag. (M. 30). He moved on and completed his questioning with respect to the other bags then returned to the black suit bag. (M. 13). He asked again if the bag belonged to anyone and no one claimed the bag. (M. 13). Trooper Burnette then took the bag from the overhead compartment and held it over his head at the front of the bus. (M. 13). Again no one claimed the bag. (M. 13). Trooper Burnette testified that at that point he considered the bag to be abandoned property and took it off the bus and searched it. (M. 14). Inside the bag, he found a white paper bag containing four wrapped "baggies," one containing suspected cocaine and three containing suspected heroin. (M. 14). The suspected heroin was separated into approximately three hundred packets. (M. 14).

Trooper Burnette testified that there were no weapons displayed during the procedure of bag identification. (M. 14). He did not recall any specific conversations with passengers as he went along. (M. 15). The entire procedure took "no longer than two minutes." (M. 15). Trooper Burnette stated that during interdiction stops all passengers are able to move around and are free to leave the bus. (M. 23). He further stated, "Quite frankly when we are on the bus we have them get out and smoke a cigarette or just get off the bus. We don't restrict their movements whatsoever." (M. 23). He did not recall whether anyone stepped off the bus during the interdiction procedure in this case; he stated it was possible. (M.

29). He further stated that they do not really try to "keep track" of the passengers during the interdiction stop; if one gets off they may observe them get off the bus but they do not keep track of them. (M. 32). Trooper Burnette stated that he had never had a passenger get off the bus before identifying their bag but they were free to do so and he would not stop them. (M. 33).

Once Trooper Burnette found the suspected heroin and cocaine, he zipped the bag closed and hung it on the door of the bus. (M. 19). Corporal Welkner watched the bag while Trooper Burnette reentered the bus to attempt to find a suspect. (M. 19). At that point, Respondent, who had been in the Maryland House during the interdiction procedure and search of his bag, approached the bus and attempted to reboard it. (M. 19-21). The bus driver did not think Respondent was a passenger on the bus but then realized he had miscounted and recognized Respondent was, in fact, a passenger on the bus. (M. 21).

At that point, Corporal Welkner asked Respondent whether the bag hanging on the bus door was his and Respondent said it was. (M. 44). Respondent then quickly changed his mind and stated the bag was not his. (M. 44). Corporal Welkner then advised Respondent of his rights and Respondent stated that the bag was his and that he was transporting the drugs in the bag to Richmond, Virginia. (M. 46).

Respondent testified that he was a passenger on the bus and had stored his suit bag in the overhead compartment of the bus. (M. 52). He further testified that

when they arrived at the Maryland House he exited the bus and went inside to use the bathroom and to get something to eat. (M. 52-53). He did not intend to abandon his bag by leaving it in the overhead compartment of the bus while he went inside the Maryland House; he intended to return to the bus and continue his trip. (M. 53).

REASONS FOR DENYING THE WRIT

This case represents a simple and straightforward application of prior precedent of this Court. In several cases, this Court has made clear that although police officers may generally approach an individual in a public place and ask questions of that person, even though they have no basis for suspecting that person is guilty of some wrongdoing, the individuals approached have a corollary right to ignore the officers' questions, refuse to speak to them, and continue their business without regard to the officers' presence. *See Florida v. Bostick*, 501 U.S. 429 (1991)(even when police officers have no basis for suspecting a particular individual, they may generally ask questions of that individual, examine the individual's identification, and request consent to search his or her luggage, as long as the police do not convey a message that compliance with their requests is required); *Florida v. Royer*, 460 U.S. 491, 497-98 (1983)(law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, or by putting questions to him if the person is willing to listen, but the person approached need not

answer any question put to him and may decline to listen to the questions at all and may go on his way; he may not be detained even momentarily without reasonable, objective grounds for doing so, and his refusal to answer questions does not, without more, furnish those grounds); *United States v. Mendenhall*, 446 U.S. 544, 553-554 (1980)(police officers enjoy the liberty possessed by every citizen to address questions to other persons but the person addressed has an equal right to ignore his interrogator and walk away; as long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would require some particularized and objective justification); *Brown v. Texas*, 443 U.S. 47, 52-53 (1979)(the application of a Texas statute to detain the defendant and require him to identify himself violated the Fourth Amendment because the officers lacked any reasonable suspicion to believe he was engaged in any criminal conduct; in the absence of any basis for suspecting misconduct, the balance between the public interest and the defendant's right to personal security and privacy tilts in favor of freedom from police interference).

Thus, in this case, the Maryland troopers had the right to board the bus and ask passengers to cooperate with them if they chose to do so and the passengers had the corollary right to ignore the officers and refuse to talk to them or to leave the bus if they so chose. Indeed, Trooper Burnette stated that the passengers were free to move about and leave the bus if they chose and that it was possible one or more of them had done so in this case. He further stated that they do not keep track of the

passengers during an interdiction. Under these circumstances, it is difficult to understand how the troopers could ever *reasonably* conclude that a bag was abandoned when there is nothing more than silence as to its ownership. If passengers are free to come and go as they please and the officers have no idea whether they have left the bus during the interdiction, and if passengers have the right, as they clearly do under the above cited cases of this Court, to simply ignore the troopers and not respond to their questions, then it is patently unreasonable to conclude from mere silence that the passengers have abandoned their baggage when they do not respond to the troopers' questions whether the bag belongs to anyone. *See State v. May*, 608 A.2d 772, 774-776 (Me. 1992)(abandonment cannot be inferred from mere silence in response to police questioning and therefore defendant did not abandon his wallet which he inadvertently lost in police cruiser by merely shrugging his shoulders and not taking steps to secure his wallet in response to police questions regarding wallet); *State v. Joyner*, 66 Haw. 543, 669 P.2d 152, 153-154 (Hawaii 1983)("To equate a passive failure to claim potentially incriminating evidence with an affirmative abandonment of property would be to twist both logic and experience in a most uncomfortable knot" and therefore the court could not find abandonment from defendant's mere silence when a police officer asked him if an unzipped bag located one to two feet away from him in a bath house was his).

Contrary to the Petitioner's assertion in its petition before this Court, the courts are not in conflict over whether abandonment may be inferred from mere

silence. Indeed, Petitioner cites no case which supports the proposition that abandonment may be inferred from silence alone. Courts have held that abandonment may be inferred from actions on the part of the owner of the property which constitute a disclaimer of the property. *See Duncan v. State*, 281 Md. 247, 266-67, 378 A.2d 1108 (1977)(where defendants parked car on stranger's private property, left it there, and then denied any connection with or knowledge of the car in response to police questions, court found they had abandoned car); *United States v. Thompkins*, 998 F.2d 629, 632-33 (8th Cir. 1993)(where defendant denied ownership of a bag in the baggage compartment of the bus and told the officers to search it, court found abandonment of the bag); *United States v. Flowers*, 912 F.2d 707, 711 (4th Cir. 1990)(defendant held to have abandoned his bag located in the overhead bin directly above his seat on Greyhound bus when he expressly disclaimed ownership of it in response to police officer's question). None of the cases cited by Petitioner at pages 11 and 12 of its petition, however, support the proposition that abandonment can be inferred from mere silence. The cases cited by Petitioner fall into one of two categories: (1) those in which courts have held that the defendant's actions constituted a disclaimer and therefore an abandonment of his property and (2) those in which courts have held that the defendant's mere silence could not be considered a disclaimer or abandonment of his property. As the Maryland Court of Appeals noted in this case, there is a significant difference between a disclaimer of ownership and mere silence. "An affirmative disclaimer of owernship is markedly

different from passive failure to claim one's property." *Stanberry v. State*, 343 Md. 720, 733, 735-36, 684 A.2d 823 (1996). Moreover, in this case, the Petitioner has never contended, nor has any lower court found, that Respondent abandoned his black suit bag by virtue of disclaimer.

Nor has the Petitioner in this case contended, or any lower court found, that Respondent abandoned his black suit bag by leaving it unattended on the Greyhound bus on which he was a passenger while he went into the Maryland House for twenty minutes during his rest stop. Prior cases of this Court and other courts would indicate that such an argument would be futile. *See United States v. Place*, 462 U.S. 696, 707 (1983)(recognizing that individuals possess a legitimate expectation of privacy in the contents of their luggage); *Arkansas v. Sanders*, 442 U.S. 753, 762 (1979)(recognizing that luggage is a common repository for one's personal effects, and therefore is inevitably associated with the expectation of privacy); *United States v. Rem*, 984 F.2d 806, 811 (7th Cir. 1993)(failure to retrieve a checked suitcase from a baggage claims area does not automatically constitute abandonment); *United States v. Lee*, 916 F.2d 814, 818 (2d Cir. 1990)(temporarily leaving luggage in a secured area does not indicate abandonment); *United States v. Most*, 876 F.2d 191, 198-99 (D.C. Cir. 1989)(leaving shopping bag with store clerk, as required by store policy, does not constitute abandonment).

The Petitioner's argument in this case has never been that Respondent did anything which would indicate an intent to abandon his property; it consistently has

been that the officers reasonably believed the bag to be abandoned based on the fact that the bus driver told them all of the passengers had reboarded the bus and the fact that no one claimed the bag in response to their questions. The fundamental problem with this argument, which was recognized by the Maryland Court of Appeals, is that it erroneously assumes the passengers on the bus were required to answer the officers when they asked whether the bag belonged to anyone, and it further erroneously assumes that the police officers reasonably believed all passengers were back on the bus despite Trooper Burnette's testimony that he had no idea whether any passengers had gotten off of the bus during the interdiction procedure. Consequently, the Maryland Court of Appeals was correct in stating:

> We conclude that, under the totality of the circumstances, the troopers should not have inferred abandonment from the passengers' silence. As we stated above, in accord with the Supreme Court mandate in *Florida v. Bostick*, in order for the drug interdiction search to meet constitutional requirements, a passenger must feel free to refuse to comply with police requests, to remain silent in response to police questions, and to leave the bus if desired.
>
> In sum, under these circumstances, it was not reasonable to conclude that the luggage was abandoned. Hence, the Fourth Amendment applied to the drug interdiction search. As previously stated, subject to a few well-delineated exceptions, warrantless searches are *per se* unreasonable. *McMillian v. State*, 325 Md. 272, 281, 600 A.2d 430, 434 (1992); *Ricks v. State*, 322 Md. 183, 188, 586 A.2d 740, 743 (1991). In this case, the State failed to establish that any recognized exception to the warrant requirement applied.

343 Md. at 739-740 (footnote omitted).

The Petitioner's attempt to squeeze this case into the good faith doctrine espoused in *United States v. Leon*, 468 U.S. 897 (1984), fairs no better. As the

Petitioner noted in its petition in this case, the crux of the good faith doctrine is that the police officers acted *reasonably*. As noted above, this case does not present a situation where the officers acted reasonably because they erroneously and unreasonably assumed abandonment from mere silence. It is significant to point out here that Trooper Burnette was well aware of the constitutional requirements of interdiction procedures and with the mandates set forth in *Bostick*. He stated he knew they were required to permit the passengers to leave the bus if they so chose and encouraged them to do so. He further stated that they did not want anyone to think they were coerced into cooperating with them in the interdiction. Thus, on the face of this record, given the Trooper's own testimony, it is clear that the officers acted unreasonably when they assumed Respondent's black bag was abandoned because nobody responded to their question asking whether it belonged to anyone. Despite the apparent conflict in the federal circuit courts regarding whether to apply the good faith exception to warrantless searches, this case does not present a situation to which the good faith exception would apply.

CONCLUSION

This Court's prior decisions are perfectly clear in establishing the standard of reasonable police conduct to be applied in drug interdiction cases. The lower court was not "fundamentally at odds with this Court's Fourth Amendment jurisprudence" in concluding that the police in this case unreasonably assumed abandonment of property from mere silence during a drug interdiction procedure on a Greyhound

bus. Moreover, there is no significant conflict in the decisions of the federal circuit courts or the highest state courts on this issue. It follows that this case is not an appropriate one for certiorari review in this Court.

Respectfully submitted,

Stephen E. Harris
Public Defender

Melissa Moore
Assistant Public Defender
Counsel of Record

Counsel for Respondent